

In the Matter of WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
FAIRHAVEN EDUCATION ASSOCIATION, et al.

and

DAVID DUPUIS et al.

Case. No. ASF-2097

2098

3015

2055

2056

2057

72.3 *agency service fee*
75.4 *financial disclosures*
82.12 *other affirmative action*

October 29, 1997

Robert C. Dumont, Chairman

Claudia T. Centomini, Commissioner

Susan Lee Weissinger, Esq. *for the Wareham Education Association, the Bridgewater Education Association, the Fairhaven Education Association*

Bruce N. Cameron, Esq. *for David Dupuis, et al.*
Glenn M. Taubman, Esq.

DECISION AND ORDER

Statement of the Case

Eleanor Dupuis, David Dupuis, Peter Anthony, Charles Cipollini and Betsy Ann Wood filed charges with the Labor Relations Commission (the Commission) alleging that affiliates of the Massachusetts Teachers Association/NEA¹ imposed a service fee for the 1988-89² school year that was based on an invalid demand and that was in excess of the amount permitted by Section 12 of the Law. The Commission investigated the charges and issued separate Complaints of Prohibited Practice that were identical in all material respects. The two-count complaints alleged that the WEA, BEA and FEA violated Section 12 of M.G.L. c.150E (the Law) by

demanding an agency service fee without providing the Charging Parties with an independent auditor's financial statement of its revenues and expenses for the relevant time period (Count I) and by demanding an amount in excess of the amount permitted by the Law (Count II). The Unions subsequently filed answers to the Commission's complaints.

On September 20, 1990, the Commission bifurcated the complaints and ordered a formal hearing for the allegations in Count I of the Complaints. Hearing Officer Judith Neumann held a hearing on November 15, 1990, after which the Unions filed a Motion to Reopen the Hearing. The Commission allowed the Motion and subsequently held a second day of hearing.³ The parties filed final briefs following the hearing.

The Charging Parties subsequently filed a Motion to Supplement the Record. The Union opposed the Charging Parties' Motion, and Commissioner Dalton held a hearing for the Commission to determine the admissibility and probative value of the evidence proffered by the Charging Parties. Following the hearing, the Union and the Charging Parties submitted supplemental briefs,⁴ and former Commissioner William J. Dalton,⁵ acting as an administrative law judge, issued Recommended Findings of Facts. Both parties filed Challenges to the Recommended Findings, and responses to the other parties' Challenges.⁶

Findings of Fact

Facts Pertaining to ASF-2097, 2098, Bridgewater Education Association

The Bridgewater School Committee is the representative of the Town of Bridgewater for purposes of collective bargaining with employees of the Bridgewater schools. The Bridgewater Education Association/MTA/NEA is an employee organization within the meaning of the Law and is the exclusive collective bargaining representative for the unit of employees that includes David Dupuis and Eleanor Dupuis. The bargaining unit represented by the BEA contained approximately 114 members and two non-members. The BEA and the School Committee are parties to a collective bargaining agreement effective from September 1, 1988 through August 31, 1991 which covers all members of the bargaining unit represented by the BEA. That contract contains an agency fee provision.⁷

1. The Wareham Education Association (WEA), the Bridgewater Education Association (BEA) and the Fairhaven Education Association (FEA).

2. Betsy Ann Wood also challenged the service fee demanded by the Wareham Education Association/MTA/NEA for the 1987-88 school year.

3. Hearing Officer Neumann left the Commission's employ in October 1992.

4. The Unions filed a Motion to Strike the references in the Charging Parties' Supplemental Brief that refer to the Lexington Teachers Association as a "small" local union, and a statement describing the size of the Lexington Teachers Association's annual budget. Neither the size of the Lexington Teachers Association nor the size of its budget is a material fact in this case; consequently, we need not decide whether these references in the Charging Parties' Supplemental Brief should be stricken. The Motion is denied.

5. Commissioner Dalton left the Commission's employ in August 1997.

6. Subsequently, the Unions filed a Motion to Strike certain references to the Lexington Teachers Association (LTA) that the Charging Parties made in their supplemental brief. Specifically, the Unions objected to the inclusion of the size of the LTA's budget and the Charging Parties' characterization of the LTA as a "small" local union, arguing that this information was not included in the reported decision in the case of *Lowary v. Lexington Board of Education*, 903 F.2d (6th Cir. 1990) and should not be included in the Charging Parties' brief. We did not consider the size of the LTA, or the size of its budget in reaching our decision, and consequently, we need not decide whether this information was inappropriately included in the Charging Parties' supplemental brief. The Motion is denied.

7. [See next page]

David Dupuis and Eleanor Dupuis are public employees within the meaning of the Law. Mr. and Ms. Dupuis were not members of the BEA during the 1988-89 school year and were required to pay an agency fee under the contractual agency service fee provision. On or about June 21, 1989, the BEA demanded that Mr. and Ms. Dupuis pay an agency service fee in the amount of \$275.45 for the 1988-89 school year of which \$30.00 was payable to the BEA,⁸ \$186.95 was payable to the Massachusetts Teachers Association and \$58.50 was payable to the National Education Association.⁹ Mr. Dupuis and Ms. Dupuis challenged and continue to challenge the amount of the service fee demanded by the BEA for the 1988-89 school year.

The BEA's demand included a letter setting forth the amount of the service fee, the existence of a rebate procedure, the demand itself and the consequences of failure to pay the fee.¹⁰ The letter also stated:

The amount for this year was calculated after a review of the most recent financial reports available to the Local, MTA, and NEA. A detailed explanation of the way the Local, MTA and NEA portions of the agency fee were calculated is enclosed...

In accordance with a decision of the Labor Relations Commission, you are entitled, upon request, either to obtain from the Local a list of all expenditures or to examine the Local's financial receipts and record of expenses at a time convenient to you and to the Local....¹¹

The financial information recorded in this explanation was prepared by the undersigned based on the actual financial records of the Association for the 1987-88 fiscal year. In order to determine if an expense was chargeable or nonchargeable, I relied on the criteria set forth in 456 CMR 17.04 and the instructions included herein. In signing this form, I certify that the information contained herein is

a true and accurate reflection of the Association's actual expenditures during the 1987-88 year to the best of my knowledge and ability. Signed under the pains and penalties of perjury.¹²

The demand also included a "Local Association Agency Fee Explanation" describing how the Local calculated its share of the service fee, and a book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information." This book contained a CPA's audit of the NEA and MTA. The BEA's demand did not provide Mr. Dupuis or Ms. Dupuis with an independent auditor's financial statement of its revenues and expenses for the fiscal year preceding the period for which the fee was demanded.

The financial records of the BEA include the following documents:¹³

- A master list of expenses listing check numbers, payees and amounts 6 ledger pages
- Approximately 68 check stubs listing the payee
- Approximately 68 cancelled checks¹⁴
- Approximately 26 records of deposits
- 1 savings withdrawal slip
- Monthly bank statements
- Records of income
- Approximately 52 receipts or invoices¹⁵
- A passbook from the Bridgewater Credit Union
- A two-page summary of operations prepared by the BEA treasurer

The BEA's total income for the 1987-88 school year was \$44,794.40, and it forwarded \$26,874.00 in dues and \$444.44 in agency service fees to the MTA and NEA.

7. Article XXVII Agency Fee

1. The Committee agrees to require, as a condition of employment, that all employees covered by this Contract, except those employees certified as members to the Committee by the Association, pay annually or by dues deduction to the Association, as of the 30th day subsequent to the effective date of this Agreement, or 30 days subsequent to the execution of this Agreement, whichever is later, an Agency Service Fee equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent to or from which membership dues are paid...

8. The Unions asked that the Commission modify the Findings of Fact to indicate the actual pro-rated chargeable amounts, and the fact that the fees were limited to the dues amounts, arguing that the reduction simplifies the task of verifying certain expenses. We decline to adopt this finding because the amount of chargeable expenses is not relevant to this decision, nor is the question of whether certain expenses are easier to verify than others.

9. During 1988-89, BEA dues were \$299.00, of which \$30.00 was payable to the BEA, \$191.00 was payable to the Massachusetts Teachers Association (MTA), and \$78.00 was payable to the National Education Association (NEA).

10. The Unions challenge this fact by asking the Commission to clarify that the demand letter disclosed to the Charging Parties the amount of the service fee due to each of the affiliated unions. This is one of many additional findings of fact that the Unions have requested for the purpose of gauging the sufficiency of the information provided regarding the local's expenditures. Our decision in this case is based on our interpretation of *Chicago Teachers Union vs. Hudson*, 475 U.S. 292 (1986) and its progeny, as well as the uniqueness of an audit, and does not depend on the condition of these Unions' financial records or the specific information contained in their demands. Consequently, we need not supplement or otherwise modify the Recommended Findings of Fact in which the demands, the Unions' financial records, or the treasurers' affidavits are described.

11. The Unions asked the Commission to modify the Findings of Fact to state that no evidence exists indicating that Mr. Dupuis or Ms. Dupuis ever requested a list of expenditures or the opportunity to examine the BEA's financial receipts and records. We decline to make this finding because an individual fee payor's willingness or reluctance to personally review a union's financial records is not germane to our decision.

12. This statement was signed by the BEA treasurer but was not notarized.

13. The Unions asked the Commission to add findings of fact further describing the condition of the Unions' financial records and noting the simplicity of verifying expenditures. As we discuss in the decision below, an auditor's ability to test and verify expense documentation is central to our decision and the record contains no evidence demonstrating that an individual fee payor could test this information in the same manner. Consequently, we decline to subjectively assess the ease with which an individual fee payor could verify union expenses, or describe the judgment a fee payor would be in a position to make after reviewing a union's financial records.

14. Checks listed the payee and frequently contained a one or two word description; however, the meanings of the descriptions were not always readily apparent. Some of the checks were supported by disbursement records, in varying degrees of detail and formality, and others were not. In one instance, the payor wrote a check to himself, ostensibly for a "stipend".

15. Some, but not all, of the invoices contained the check number of the check which paid the item. However, the master expenditure list identified the check that paid the invoice. By matching the checks and invoices it was possible to get a general idea of where most of the money was spent, although some of the descriptions were vague or unclear.

Facts Pertaining to ASF-3015, 2055, Wareham Education Association

The Wareham Education Association (WEA) is an employee organization within the meaning of the Law and is the exclusive bargaining agent for the unit of employees which includes Betsy Ann Wood (Wood). The bargaining unit represented by the WEA contained 204 members and one non-member. The Wareham School Committee represents the Town of Wareham in collective bargaining with employees of the Wareham schools. The WEA and the Wareham School Committee are parties to a collective bargaining agreement effective from September 1, 1988 through August 31, 1991. That contract contains an agency fee provision.¹⁶

Wood is a public employee within the meaning of the Law. Wood was not a member of the WEA during 1987-88 or 1988-89 and was required to pay an agency fee under the contractual agency fee provision.

On or about July 3, 1989, the WEA demanded that Wood pay an agency service fee in the amount of \$262.73 for the 1988-89 school year of which \$30.00 was payable to the WEA, \$174.23 was payable to the MTA and \$58.50 was payable to the NEA.¹⁷ On or about October 13, 1989, the WEA demanded that Wood pay an agency service fee in the amount of \$242.63 for the 1987-88 school year of which \$29.18 was payable to the WEA, \$157.57 was payable to the MTA and \$55.88 was payable to the NEA.¹⁸ Wood challenged and continues to challenge the amount of the service fee demanded by the WEA for the 1987-88 and 1988-89 school years.

The WEA's demands included letters setting forth the amount of the service fee, the existence of a rebate procedure, the demand itself and the consequences of failure to pay the fee. The letters also stated:

The amount for [the 1987-88 and 1988-89] school years was calculated after a review of the most recent financial reports available to the Local, MTA, and NEA. A detailed explanation of the way the Local, MTA and NEA portions of the agency fee were calculated is enclosed....

In accordance with a decision of the Labor Relations Commission, you are entitled, upon request, either to obtain from the Local a list of all expenditures or to examine the Local's financial receipts and record of expenses at a time convenient to you and to the WEA....

The 1988-89 demand also contained the following language:

The financial information recorded in this explanation was prepared by the undersigned based on the actual financial records of the

Association for the 1987-88 fiscal year. In order to determine if an expense was chargeable or nonchargeable, I relied on the criteria set forth in 456 CMR 17.04 and the instructions included herein. In signing this form, I certify that the information contained herein is a true and accurate reflection of the Association's actual expenditures during the 1987-88 year to the best of my knowledge and ability. Signed under the pains and penalties of perjury.¹⁹

The demands for both school years also included a "Local Association Agency Fee Explanation" describing how the Local calculated its share of the service fee, and a book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information." This book contained a CPA's audit of the NEA and MTA. The demands did not provide Wood with an independent auditor's financial statement of its revenues and expenses for the fiscal years preceding the periods for which the fees were demanded.

The WEA's financial records consisted of:

- Ledger pages
- Approximately 40 cancelled checks, containing a one or two word description of the expenditure
- Approximately 48 check stubs
- Approximately 21 receipts or invoices²⁰
- Monthly bank statements
- Monthly treasurer's reports
- An accountant's summary of operations.

The WEA's income in 1987-88 was \$60,303.02 and it forwarded \$50,881.00 in dues to the MTA/NEA.

Facts Pertaining to ASF-2056, 2057, Fairhaven Education Association

The Fairhaven School Committee is the representative of the Town of Fairhaven for purposes of collective bargaining with employees of the Fairhaven schools. The Fairhaven Education Association (FEA) is an employee organization within the meaning of the Law and is the exclusive bargaining agent for the unit of employees which includes Cipollini and Anthony. The bargaining unit represented by the FEA contained 178 members and seven non-members. The FEA and the School Committee were parties to a collective bargaining agreement effective from September 1, 1986 through August 31, 1989. That contract contained an agency fee provision.²¹ Charles Cipollini and Peter R. Anthony are public employees within the meaning of the Law. Cipollini and Anthony were not members of the FEA during 1988-89 and were required to pay a contractual agency service fee. On or about June 27, 1989, the FEA demanded that Cipollini and Anthony pay an agency

16. *Article XXXVI Agency Fee*

A. The Committee agrees to require, as a condition of employment, that all employees covered by this Agreement, except those employees certified as members to the Committee by the Association, pay annually or by dues deduction to the Association, as of the thirtieth (30th) day subsequent to the effective date of this agreement, or thirty (30) days subsequent to the execution of this Agreement, whichever is later, an Agency Fee as determined in accordance with the applicable Rules and Regulations of the Labor Relations Commission relative to the Agency Service Fee....

17. During 1988-89, WEA dues were \$299.00, of which \$30.00 was payable to the WEA, \$191.00 was payable to the MTA, and \$78.00 was payable to the NEA.

18. During 1987-88, Association dues were \$283.00, of which \$30.00 was payable to the WEA, \$178.00 was payable to the MTA, and \$75.00 was payable to the NEA.

19. This statement was signed by the WEA treasurer but was not notarized.

20. Copies exist of most of the invoices, and most of the invoices list the check numbers for the check that paid the bill. There are some handwritten notes in lieu of invoices for some expenses with no supporting verification.

21. *Article 32. AGENCY FEE*

32:1 The Committee agrees to require (during the term of this Agreement) that all employees covered by this Agreement except those employees certified to the Committee by the Association as being members of the Association as of the 45th day of their employment or the 30th day after the effective date of this Agreement, whichever is later, shall pay to the Fairhaven Educators' Association a service fee set by the Association which fee shall not exceed the amount of dues paid to the Association by a regular active member....

service fee in the amount of \$290.45 for the 1988-89 school year of which \$45.00 was payable to the FEA, \$186.95 was payable to the MTA and \$58.50 was payable to the NEA.²²

The FEA's demand included a letter setting forth the amount of the service fee, the existence of a rebate procedure, the demand itself and the consequences of failure to pay the fee. The letter also stated:

The amount for this year was calculated after a review of the most recent financial reports available to the Local, MTA, and NEA. A detailed explanation of the way the Local, MTA and NEA portions of the agency fee were calculated is enclosed...

In accordance with a decision of the Labor Relations Commission, you are entitled, upon request, either to obtain from the Local a list of all expenditures or to examine the Local's financial receipts and record of expenses at a time convenient to you and to the Local....

The financial information recorded in this explanation was prepared by the undersigned based on the actual financial records of the Association for the 1987-88 fiscal year. In order to determine if an expense was chargeable or nonchargeable, I relied on the criteria set forth in 456 CMR 17.04 and the instructions included herein. In signing this form, I certify that the information contained herein is a true and accurate reflection of the Association's actual expenditures during the 1987-88 year to the best of my knowledge and ability. Signed under the pains and penalties of perjury.²³

The demand also included a "Local Association Agency Fee Explanation" describing how the Local calculated its share of the service fee, and a book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information," which included a CPA's audit of the NEA and MTA. The FEA's demand did not provide Cipollini and Anthony with an independent auditor's financial statement of its revenues and expenses for the fiscal year preceding the period for which the fee was demanded.

Cipollini and Anthony challenged and continue to challenge the amount of the service fee demanded by the FEA for the 1988-89 school year. On March 10, 1988, the Charging Parties filed charges challenging the 1987-88 agency fee and the Commission held an investigation.²⁴ At the investigation Anthony, Cipollini and their attorney Bruce Cameron, were present. Pursuant to Cameron's request, the FEA brought its financial books and records to the investigation. However, the FEA refused to allow Cameron to review the books — allowing only Cipollini and Anthony to review them. Both Cipollini and Anthony refused to review the books unless they could be assisted by counsel. Cipollini and Anthony

never asked to review the FEA financial records related to the 1988-89 demand because they believed, based on the events related to the 1987-88 demand, that Cameron would not be able to assist them.²⁵

The financial records of the Fairhaven Education Association consist of the following:²⁶

Summary journals listing the year's expenditures; each expenditure lists a short description
Monthly treasurer's reports
Monthly bank statements and approximately 146 cancelled checks²⁷
Bank deposit slips
Check stubs
A financial statement from accountant Robert Yeaton
An "expense voucher" form for each expenditure²⁸ and copies of the pertinent invoices and check stubs which are attached to the forms.

The FEA's gross income for 1987-1988 was \$65,000.00 and it paid \$36,268.00 in dues to the MTA/NEA/BCEA.

Kinds of Audits and Procedures

There are three levels or kinds of service that an accountant or auditor can provide of an entity's financial statements: a compilation, a review and an audit. The purpose of these services is to determine and disclose the level of reliance which can be placed on an entity's financial statements. Each level of service consists of three components: a report, a set of financial statements,²⁹ and notes accompanying the financial statements. Although the financial statements and accompanying notes are generally the same for each level of service, the report differs significantly depending on whether the service performed is a review, a compilation or an audit.

A compilation is the lowest level of service and offers no assurance that the numbers listed in the financial statements are fairly stated. In a compilation, an accountant³⁰ receives financial information from the management of an entity, reviews the figures for clerical errors and records the figures in the form of financial statements. The accountant may also discuss the accounting policy with management and try to identify any issues that were not in conformity with generally accepted accounting principles and issues a report. The accountant is not required to make inquiries or perform other procedures to verify, corroborate or review information supplied by the entity.

22. During 1988-89, FEA dues were \$314.00, of which \$45.00 was payable to the FEA, \$191.00 was payable to the MTA, and \$78.00 was payable to the NEA.

On January 19, 1988, the FEA made a demand upon Anthony and Cipollini for an agency fee for the 1987-88 school year. On June 28, 1989, this 1987-88 agency fee demand was withdrawn and the charges filed by Cipollini and Anthony were subsequently dismissed.

23. This statement was signed by the FEA treasurer but was not notarized.

24. This demand was subsequently withdrawn.

25. We have modified this finding of fact, at the request of the Unions, to clarify the events in question.

26. The Unions asked the Commission to find that their financial records provided sufficient information about the reliability of the expenditures included in the demand that non-members could make an informed decision to either challenge the fee or pay their fair share. We decline to adopt this finding because it is not factually or legally correct.

27. Many checks contain no description of the expenditure.

28. We have not relied on Appendix D in our findings of fact because the parties agreed that the form marked as Appendix D in the Recommended Findings was not the form used for most FEA expenditures.

29. A financial statement includes a balance sheet, income statements and a change in fund balance statement.

30. There is no difference in licensing between an auditor and an accountant but the terms differ according to which level of service is being performed.

The review is the next level of service in which an accountant performs limited testing of the figures listed on the financial statements using analytical procedures and inquiries of management. The objective of a review is to provide a reasonable basis for an accountant to express limited assurance that there are no material modifications that should be made to the financial statements. A review requires no actual testing of documentation. Instead, the accountant reviews the accounting books and journals and relies on verbal inquiries of management.³¹ Specifically, the accountant performs an analytical review of the listing of accounts at year end, as well as a comparative analysis from year to year to look for consistency or unusual changes. The accountant also compares actual results to the entity's budget. Depending on whether problems existed with the analysis, the accountant would look for schedules that were tied to the listing of accounts, i.e. at cash to see if a bank reconciliation was completed. Finally, the auditor generates the report, the financial statements, and the note disclosures.³² Because these procedures are used, the review is more reliable than a compilation.

The audit is the highest level of service. The objective of the audit is to express an auditor's opinion on the extent to which the financial statements fairly present, in all material respects, the entity's financial position, results of operations and cash flows, in conformity with generally accepted accounting principles. An auditor employs the following procedure when performing an audit. First, the auditor reviews the entity's internal controls - its internal procedures and accounting system - to determine the level of risk and the auditor's level of reliance.³³ Based on this information, the auditor determines which testing methodology to use, either the substantive approach or the compliance approach. In the substantive approach, the auditor places no reliance on internal controls and tests all the account balances in detail (over the materiality level³⁴) by physically viewing the supporting documentation. For example, the auditor could review every check and invoice written on a particular account to ensure that the amounts matched and proper approval process was followed, using their judgment to determine how many accounts to review. The auditor could also review leases to determine whether payment matched the lease agreement. Conversely, in the compliance approach the auditor relies on internal controls and tests the accounting cycles, thereby reducing the amount of substantive testing that would be necessary.

In addition, the auditor completes the confirmation process by sending confirmation requests to banks (for loans or cash), or others for accounts receivable and accounts payable. Finally, the auditor considers subsequent events, such as whether a loss of assets occurred after the fiscal period or whether litigation existed which would substantially change the financial picture.

There are certain limitations inherent in the auditing process. For example, the American Institute of Certified Public Accountants (AICPA) *Codification of Statements on Auditing Standards* provides in part that:

Because of the characteristics of irregularities, particularly those involving forgery and collusion, a properly designed and executed audit may not detect a material irregularity. For example, generally accepted auditing standards do not require that an auditor authenticate documents, nor is the auditor trained to do so. Also, audit procedures that are effective for detecting a misstatement that is unintentional may be ineffective for a misstatement that is intentional and is concealed through collusion between client personnel and third parties or among management or employees of the client.

Costs of Audits

There is no standard fee for auditing services. One approach is to estimate the number of hours within each line item for each level of service, apply a rate and compute the estimated cost. Occasionally, however, additional services such as accounting services, are necessary to complete the audit, and those services would increase the overall cost. Other considerations in the cost of an audit are the possibility of future business with the entity, the audit risk,³⁵ competitive forces affecting the profession and the client's ability to generate the necessary schedules.

Auditing procedures do not differ based on an entity's annual income; consequently, the cost of an audit would be the same for a union with a small income as it would be for a union with a larger income.

Actual Costs of Audits

In 1989, the accounting firm of Daniel Dennis & Company audited the financial statements of the local unions in Springfield, Chicopee, Newton and Taunton and charged the following fees:³⁶

Springfield - \$3,460.74

31. In contrast, an audit confirms the verbal inquiries through supporting documentation.

32. The Charging Parties have asked us to add the following sentence to the Findings of Fact: [a]ll information included in those financial statements, including the note disclosures, are the representations of union officials and not of the auditor. The record, specifically, the *AICPA Codification of Statements on Standards for Accounting and Review Services*, AR Section 100.32(b), provides in pertinent part that "[a]ll information included in the financial statements is the representation of the management (owners) of the entity." We amend the Findings of Fact to add the quoted portion of the AICPA Codification.

33. If one person performs all the financial recordkeeping and there is no segregation of duties, an auditor would place little reliance in the entity's internal controls.

34. "Materiality" is a term used to express an auditor's level of acceptable error in financial statements.

35. In his findings of fact, Commissioner Dalton stated that the term "audit risk" was not defined in the record. Both parties subsequently directed our attention to the *AICPA Codification of Statements on Auditing Standards* AU Section 312. AU Section 312.02 defines audit risk as the risk that the auditor may unknowingly fail to appropriately modify his opinion on financial statements that are materially misstated. The concept of audit risk is further defined and explained in the remainder of Section 312.

36. The Charging Parties asked us to add to the findings of fact, the cost of the Malden audit and the number of audit hours required for each of the Springfield, Chicopee, Newton, Taunton and Malden locals. We did not consider the condition of these unions' financial records in reaching our decision; consequently, the number of hours required to audit these locals' financial statements is not a material fact. We decline to add the cost of the Malden audit because that evidence is superfluous.

Chicopee - \$2,811.50

Newton - \$2,230.36

Taunton - \$4,105³⁷

The MTA subsequently paid for these audits.³⁸

The March 27, 1991 Letter

Charles Baldwin (Baldwin) has been employed by the MTA since 1974 as a regional services consultant. In that capacity, he provides advice and counsel concerning collective bargaining and member advocacy issues to various MTA affiliated local unions. His specific duties include serving as the chief spokesman at negotiating sessions, representing local unions in unfair labor practice cases and arbitrations, advising local unions on grievances and unfair labor practice cases and helping to process grievances. He also serves as a liaison between local unions and the MTA. Baldwin is not a CPA, has no background or degree in accounting and is unfamiliar with the different levels of service that an auditor or an accountant can provide.

In November of 1990, Baldwin discovered that the treasurer of the Springfield Education Association (SEA) overpaid himself a stipend.³⁹ The total amount of the overpayment was \$180.00. Baldwin informed the SEA president of this action and they confronted the treasurer on or about the following day. The treasurer confirmed the overpayment, relinquished his union office keys and submitted a resignation in which he included a promise not to run for union office again.⁴⁰

In March of 1991, the president of the Pathfinder Teachers Association (PTA) told Baldwin that the treasurer of the PTA had five checks from the School Department sitting on his bureau at home, and he had not deposited those checks.⁴¹ The PTA president immediately secured the treasurer's resignation, including a promise not to run for union office again, took possession of the checks and deposited them into the PTA's bank account.

Baldwin discussed these incidents with CPA Michael O'Neil, MTA Director of Affiliate Services Robert Bonazzi, MTA General Counsel Ann Clarke and MTA Regional Manager Ralph Flynn. On March 27, 1991, he wrote the following letter to MTA Executive Director- Treasurer Edward Sullivan:⁴²

During November of 1990 and again in March of 1991, I was forced to play a significant role in removing from office two local treasurers. One was removed for malfeasance and the other for nonfeasance. These experiences were personally unpleasant and professionally disturbing.

As a result of speaking with Mike O'Neil from our C.P.A. firm during the March incident, I became more concerned. Mike ran off a list of six other locals that apparently had suffered similar problems. I have talked to Bob Bonazzi on the telephone about this, but I also felt compelled to write to you.

There are many obvious consequences to our locals and to MTA when local treasurers disregard their fiduciary responsibilities and obligations. It seems to me that we need to take some steps to protect our members, our locals and MTA from this type of financial danger.

One way of helping would be to make it disadvantageous for our locals not to have their books audited each year. We could require that as a condition of receiving local office support and the bonding of the local treasurer that each local submit proof of an annual audit. The proof could be the front page of the auditor's report. (This wouldn't result in the local opening their books to MTA, which I think could be politically messy).

This is only one way of trying to protect everyone, and it may be unworkable or politically impractical. I am sure there must be other ways as well. But I am concerned and felt an obligation to bring it to your attention.

I am copying this letter to Ann Clarke and Ralph Flynn because I have also discussed the problem with them.

P.S. On the advice of Ann Clarke, the members in both locals are not aware of the real reasons for the treasurers' resignations. Only certain officers in both locals know the truth in order to preserve confidence in the Association. Therefore, please do not divulge the identity of the two locals without first contacting me. Hopefully, you will not have to divulge the identity in any event.

The Relationship Between The Locals, the MTA and NEA

Local unions affiliated with the MTA and NEA⁴³ collect dues for the MTA and NEA from their members and transmit dues to them. If the dues have not been duly transmitted to the MTA, any member elected as a delegate to the MTA convention will not receive credentials and will not be seated at the annual meeting.

The MTA offers a local support program to all local affiliated associations who comply with specified requirements.⁴⁴ This

37. The cost of this audit included fees for accounting services. The accounting services were necessary to bring the records to the point where they could be audited.

38. As of April 27, 1992, it was the only time that the MTA paid for audits for those unions.

39. The Unions asked us to delete the names of the two local unions whose circumstances prompted Charles Baldwin to write the March 27 letter. Although the identity of these local associations is irrelevant to our decision, we decline to sanitize Commissioner Dalton's description of the events because it is not the Commission's practice to purposely withhold the identity of entities or individuals involved in wrongdoing.

40. The Charging Parties asked us to add additional facts to this paragraph regarding any subsequent MTA or SEA investigation into the activities of the SEA treasurer in prior years. The requested facts are not germane to our decision and are unnecessary.

41. The Unions challenged this finding of fact and we have modified it based on the record evidence.

42. When Baldwin wrote the letter, he did not know if an audit would expose these kinds of incidents, but believed that an audit might prevent their recurrence. O'Neil did not suggest this to Baldwin during their previous conversation.

43. The NEA is a nonprofit corporation incorporated under a special act of the United States Congress.

44. To receive local office support, the associations must annually certify the amount of their dues and expenses as well as certify that the financial statements have been audited or reviewed. They must also submit their per capita dues and requests for reimbursement on a quarterly basis and certify the amount of local dues for the succeeding fiscal year on or before September 15. The local office support guidelines also contain notification that the MTA reserves the right to audit the local's records in the event MTA deems it necessary.

program provides a limited amount of financial support from the MTA in order to defray part of the cost of operating local associations. The amount of support is based on the local dues - the higher the dues, the higher the reimbursement, up to a maximum of \$20 per member and 50% of their office expenses. Specifically, office support is available to offset the cost of the expenses in the following categories:

- 1.office-related expenses (rent, telephone, utilities, equipment, office supplies, printing, insurance, paper, clerical services, payroll taxes and audit costs).
- 2.compensation paid to local officers, committee chairs and committee members.
- 3.conferences: registration fees at MTA-approved conferences and hotel room costs at the Annual Meeting.

In 1987-88, the Fairhaven Education Association, Bridgewater Education Association and Wareham Education Association received local support.⁴⁵

In 1988-89, the MTA was the statewide affiliate of 297 local unions.⁴⁶ Of these, 30 had income in excess of \$25,000 per year. The largest annual local income was \$311,172 and the smallest annual local income was \$320.00. Eight locals wrote more than 400 checks per year, nine wrote more than 350, thirteen wrote more than 300, fifteen wrote more than 250 and nineteen wrote more than 200.

The NEA has a “uniserve” program whereby the NEA provides grants to its state affiliates to assist in funding staff representatives whose responsibilities are to implement, improve and coordinate programs of the NEA. The NEA also provides a bonding program for local treasurers.

The MTA and NEA Combined Agency Service Fee Information for 1988-89 and related information disclosed that the MTA had a total of 60,577 full-time equivalent members and agency fee payers and the NEA had a total of 1,824,500 members. MTA’s income was \$12,973,612.00 and NEA’s income was \$117,901,750.

DECISION

M.G.L. c. 150E, Section 12, as limited by the First Amendment to the United States Constitution, permits public sector unions to collect service fees from non-members to cover their pro rata share of the costs of collective bargaining and contract administration. *Springfield Education Association v. James Belhumeur et al.*, 23 MLC 233, 234 (1997); *Lyons v. Labor Relations Commission*, 397 Mass. 498 (1986). However, a union demanding a service fee from non-members must satisfy constitutional and statutory requirements. First, the union must provide an escrow procedure for all amounts charged and a rebate procedure, at the time the fee is demanded, that provides for prompt adjudication before a neutral

arbitrator. The service fee demand must conform to the requirements of Commission Rule 17.03 (456 CMR 17.03) and must be accompanied by sufficient information to allow the fee payor to determine whether the fee payor should challenge the fee. Finally, the amount of the fee must be calculated correctly based on chargeable expenses. *School Committee of Greenfield vs. Greenfield Education Association*, 385 Mass. 70 (1982); *Malden Education Association*, 15 MLC 1429 (1989).

Here, we must determine what information should accompany a service fee demand. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), the United States Supreme Court stated that “[t]he Union need not provide non-members with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.” In this decision, we shall consider whether these local unions were required to provide a local audit along with their service fee demands.

The Commission addressed this general issue in *Malden Education Association*, 15 MLC 1429 (1989) when it considered whether the Malden Teachers Association violated the Law by failing to provide adequate, audited financial information about the agency service fee to fee payor Joseph O’Connell. Consistent with its practice of applying Section 12 of the Law constitutionally, the Commission considered the amount and kind of information that Section 12 requires unions to provide with the demand. The Commission held that *Chicago Teachers Union v. Hudson* requires a union to provide, *inter alia*, a copy of an independent auditor’s financial statement of revenue and expenses for the fiscal year preceding the period for which the fee is demanded. However, in a footnote, the Commission suggested that small unions may satisfy this disclosure requirement by supplying to fee payers a sworn affidavit from a responsible union officer, attesting to the accuracy of the figures underlying the union’s fee calculations, and written assurance of either a list of the union’s expenditures or access to the union’s financial receipts and expense records. *Malden*, 15 MLC at 1435, n.10. The Unions have cited this portion of the decision as the basis for not supplying an audited financial statement with their service fee demands.

Courts, as well as the Commission, have recognized the financial burden that an audit could place on a union. In *Sheridan v. Intern. Broth. Electrical Workers, Local 455*, 940 F.Supp. 368, 375 (D. Mass. 1996), the District Court for the First Circuit noted that giving fee payors adequate financial disclosure may be time consuming and expensive. Nevertheless, courts have held that verification by an independent auditor is a binding, constitutional requirement notwithstanding the potentially onerous financial implications, *Reese v. City of Columbus*, 826 F.Supp. 1115, 1119 (S.D. Ohio 1993) *aff’d. in part, rev’d. in part on other grounds*, 71 F. 3d 619

45. We have modified this finding to accurately reflect the record evidence.

46. The Charging Parties asked us to add to the findings of fact, information pertaining to the number of MTA affiliated locals whose collective bargaining agreements do not contain an agency service fee provision, and the relationship between a local union’s size and the existence of a service fee provision in its bargaining agreements. Because the number of local unions ungoverned by agency service fee provisions is not probative of any issue in this case, we decline to make these additional findings.

(6th Cir. 1995); *Browne v. Wisconsin Emp. Relations Comm'n.* 485 N.W.2d 376, 394 (1992); *Sheridan*, 940 F. Supp. at 377, and have declined to exempt small unions from this rule. *Reese*, 826 F.Supp. at 1119, citing *Lowary v. Lexington Local Bd. of Educ. (Lowary II)*, 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990).⁴⁷ The rationale for these decisions stems, in large part, from the courts' reluctance to balance the competing interests of the unions and fee payors or to subordinate the fee payors' constitutional rights to the unions' financial interests. See *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987).

In addition, courts have recognized the important and unique role that an independent auditor plays in ensuring that fee payors have sufficient information to gauge the propriety of a union's fee. Specifically, an auditor ensures that the expenditures that the union claims it made for certain expenses were actually made for those expenditures, *Andrews v. Education Association of Cheshire*, 829 F.2d at 340, and the auditor's ability to test and verify expenditures is a critical concern. *Gwirtz v. Ohio Education Assoc.*, 887 F.2d 678, 681 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990). In *Tierney v. City of Toledo ("Tierney III")*, 135 LRRM 2801, 917 F.2d 927 (6th Cir. 1990), the appeals court remanded the case to a magistrate to determine whether the auditor utilized adequate procedures to verify the union's expenses; reasoning that "[d]isclosure of the major categories of expenses and the methodology of the agency fee calculations means very little if the non-members cannot have some level of confidence in the verification of the expenditures." The appeals court for the District of Columbia circuit expressed a similar sentiment in *Ferriso v. N.L.R.B.*, 156 L.R.R.M. 2321, 2324 (1997), a case arising under the National Labor Relations Act, by stating that "...nonmembers cannot make a reliable decision as to whether to contest their agency fees without trustworthy information about the basis of the union's fee calculations...and an independent audit is the minimal guarantee of trustworthiness." An individual fee payor with access to all of the union's checks and invoices may be able to review the union's expense information, but there is no evidence in the record before us that they could verify or test the documentation the way an auditor could.

Because an auditor's ability to test and verify expense documentation is a paramount concern, we reject the Unions' argument that a review, rather than a full audit, is constitutionally sufficient. In a review, an accountant relies on analytical procedures and inquiries of management to determine the level of reliance to place on financial statements, and performs no actual testing of documentation. Conversely, an auditor tests and verifies documents as a basis for an opinion on financial statements. *Contra, Prescott*

v. County of El Dorado, 915 F. Supp. 1080 (E.D. Cal. 1996)(District Court upholds the constitutionality of a review.) The Unions also argue that a separate audit of the locals' expenses is unnecessary because the locals' chargeable expenses constitute a minuscule fraction of the combined chargeable expenses of all three affiliated unions, and because the majority of the chargeable expenses were verified in the MTA and NEA audits. This argument is meritless. None of the locals' expenses were verified in the MTA or NEA audit and the size of the local portion of the combined chargeable expenses is as constitutionally insignificant as the size of the local itself.

As we stated in *Springfield Education Association v. James Belhumeur et al.*, 23 MLC 233, 236 (1997), we must recognize and accommodate divergent interests when interpreting and applying the Law: in this case, the fee payors' quest for sufficient information and the unions' desire to preserve their financial resources. We hold today that Section 12 of the Law requires unions, regardless of size, to provide an audit from an independent auditor along with their service fee demands, and that countervailing financial considerations do not justify an exception to this rule.⁴⁸

We agree with the Second Circuit that *Hudson* procedures are to be accorded all non-members regardless of whether the union believes them to be excessively costly. *Andrews v. Education Association of Cheshire*, 829 F.2d at 340. However, we recognize that a full audit may encompass procedures and issues, like a union's income or assets, that exceed the scope of a fee payor's concern and we agree that "[a] union need not engage its auditors to perform the highest possible level of audit service." *Sheridan*, 940 at 377, citing *Gwirtz v. Ohio Educ. Ass'n.*, 887 F.2d 678, 680 (6th Cir. 1989) *cert denied*, 494 U.S. 1080 (1990). The primary responsibility of an auditor in this context is to verify a union's calculations and disbursements. *Sheridan* at 377; see also *Belhumeur v. Labor Relations Commission*, 411 Mass. 142, 145 n.4 (1991)(The verification requirement seems to be merely verification of the major categories of expenses). The record in this case did not contain evidence concerning whether an audit can be limited in scope, or whether an auditor can express an opinion only on specified elements in a financial statement;⁴⁹ therefore, we decline to state whether a limited audit would be sufficient. We hold only that the demands at issue were invalid because the locals' expenditures were never audited, and we leave to another case, a determination of whether a limited audit or special auditor's report is permissible under the Law.

47. Generally, courts have declined to allow local unions to use a "local presumption" to avoid providing detailed audited financial statements to non-members. See *Reese v. City of Columbus*, 826 F. Supp. 1115 (S.D. Ohio 1993); *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992). But see *Browne v. Wis. Emp. Relations Com'n.*, 485 N.W. 2d 376 (1992) (Modified local presumption sufficient where an independent auditor verifies that locals' expenditures always have a lesser percentage of nonchargeable expenses than the statewide affiliate.) A local presumption is a presumption that the local union's percentage of chargeable activities is at least as great as the percentage of chargeable activities of the local's statewide affiliate.

48. We decline to follow any contrary dicta contained in the *Malden* decision and therefore do not address the Unions' arguments concerning the standard by which to determine which unions merit the *Malden* exemption.

49. The *AICPA Codification of Statements on Auditing Standards* provides procedures in AU Action 622 for "Special Reports - Applying Agreed-upon Procedures to Specified Elements, Accounts or Items of Financial Statement." However, there was no witness testimony in the hearing explaining the feasibility of using special reports in the agency service fee context.

CONCLUSION

For the foregoing reasons, we find that the Unions violated Sections 12 and 10(b)(1) of the Law by failing to provide the Charging Parties with a local audit for the fiscal years preceding the periods for which the fees were demanded.

ORDER

WHEREFORE, based upon the foregoing, it is ORDERED that the Bridgewater Education Association, the Fairhaven Education Association and the Wareham Education Association⁵⁰ shall:

1. Cease and desist from requiring the Charging Parties to pay an agency service fee for the 1988-89 school year based on the invalid demands.
2. Not seek the discharge of or any other sanction against any Charging Parties for failing to pay an agency service fee for the 1988-89 school year that was based on the invalid demands.
3. Release to the Charging Parties all of the monies held in joint escrow, plus all accrued interest to the date of the dissolution of the escrow account for the agency service fees for the 1988-89 school year.
4. Post in all places where notices are normally posted for employees represented by the Associations, and leave posted for a period of not less than thirty (30) days, copies of the attached Notice to Employees.
5. Notify the Commission in writing within ten (10) days of receipt of this decision of the steps taken to comply therewith.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has determined that the Bridgewater Education Association, Wareham Education Association and the Fairhaven Education Association violated Sections 12 and 10(b)(1) of M.G.L. c.150E by failing to provide the Charging Parties with a local audit for the fiscal years preceding the periods for which the agency service fees referred to in this case, were demanded.

WE WILL NOT do anything that interferes with, restrains, or coerces any employee in the exercise of their rights guaranteed under M.G.L. c.150E.

WE WILL NOT seek the discharge of or any other sanction against any Charging Party for failing to pay an agency service fee for the 1988-89 school year, or against Betsy Ann Wood for the 1987-1988 school year, that was based on the invalid demands.

WE WILL release to the Charging Parties all of the monies held in joint escrow, plus all accrued interest to the date of the dissolution of the escrow account for the agency service fee for the 1988-89 school year, and to Betsy Ann Wood, all of the monies and interest

for the agency service fee for the 1987-1988 and 1988-1988 school years.

WE WILL provide a local audit with any demand for a local agency service fee.

[signed]

Wareham Education Association

* * * * *

In the Matter of CITY OF BOSTON

and

BOSTON POLICE DETECTIVES BENEVOLENT SOCIETY

Case No. MUP-1087

| | |
|---------|--|
| 54.31 | <i>Impact of management rights decisions</i> |
| 54.6261 | <i>use of vehicle</i> |
| 54.8 | <i>mandatory subjects</i> |
| 67.14 | <i>management rights</i> |
| 67.164 | <i>pre-existing practice</i> |
| 67.8 | <i>unilateral change by employer</i> |
| 82.12 | <i>other affirmative action</i> |
| 82.3 | <i>status quo ante</i> |
| 92.42 | <i>motions to amend</i> |

November 6, 1997

Ann T. Moriarty, Administrative Law Judge

| | |
|----------------------------|---|
| Thomas G. Greene, Esq. | Representing the City of Boston |
| Christopher J. Groll, Esq. | |
| Christopher J. Muse, Esq. | Representing the Boston Police Detectives Benevolent Society |

ADMINISTRATIVE LAW JUDGE'S DECISION**Statement of the Case**

On January 4, 1995, the Boston Police Detectives Benevolent Society (the Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) alleging that the City of Boston (City) had violated Sections 10(a)(1), (3) and (5) of Massachusetts General Laws, Chapter 150E (the Law).

Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the charge and, on October 27, 1995, issued its own Complaint of Prohibited Practice, alleging that the City had refused to bargain in good faith by failing to give the Union prior notice and an opportunity to bargain over its decision to deny Detective Kevin Mullen's 24-hour use of an official vehicle, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The Commission

50. This remedy shall also apply to the agency service fee that the WEA demanded of Betsy Ann Wood for the 1987-1988 school year.